IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.560 OF 2005
IN
NOTICE OF MOTION NO.1898 OF 2005
IN
SUIT NO.1761 OF 2005

M/s.STP Software India Pvt.Ltd. .. Appellant

v/s.

M/s.Madhyam Infotech Pvt.Ltd.
and ors. .. Respondents

Mr.Jimmy Pochkhanwala, senior counsel with Mr.Anand Luma and Mr.D.A.Jehangir for the appellant.

Mr.Aspi Chinoy, senior counsel with Mr.Chetan Kapadia, Mr.Saukat Merchant and Mr.Sanatan i/by M/s.M & M Legal Venture for the respondent No.3.

Mr.Chirag Balsara with Mr.Nainesh Amin for the respondent No.5.

CORAM : R.M. LODHA AND
J.P. DEVADHAR, JJ.

DATED : 25th July, 2005

P.C.

Heard.

2. The plaintiff is in appeal before us aggrieved by the order dated 28th June, 2005 whereby the learned motion Judge dismissed the plaintiff's prayer for grant of temporary injunction restraining the payment under the bank guarantee dated 4.6.2004. By this order, the learned motion Judge discharged the ad-interim order. We shall refer to the parties as parties in the suit.

3. The plaintiff filed the suit against the defendants in this court praying for the following reliefs:-

"(a) That this Hon'ble Court be pleased to order and decree that the Defendant Nos.1,2 & 3 and do jointly and severally pay to the Plaintiff the sum of Rs.2,11,02,832/- (Rupees Two crores Eleven lakhs Two thousand Eight hundered Thirty Two only) being the losses suffered by the Plaintiff alongwith interest thereon @ 18% per annum from the date of the suit till the date of payment and/or realization thereof, as per the particulars of claim being Exhibit "I" hereto;

(b) That this Hon'ble Court be pleased to Order and Decree that the Defendant No.1,2 and 3 do jointly and severally pay to the Plaintiff the sum of Rs.47,70,000/- (Rupees Forty Seven lakhs Seventy thousand only) alongwith interest thereon @ 18% per annum from the date of this Suit till the date of payment and/or realization thereof as per the particulars of claim being Exhibit "J" hereto;

(c) That this Hon'ble Court be pleased to Order and decree that the Defendant Nos.1,2 and 3 do jointly and severally pay to the Plaintiff the sum of Rs.90,00,000/- (Rupees Ninety lakhs only) being the damages due to loss of profits suffered by the Plaintiff alongwith interest thereon @ 18% per annum from the date of the suit till the date of payment and/or realization thereof, as more particularly set out in Exhibit "K" hereto.

(d) That this Hon'ble Court be pleased to order and declare that the Bank Guarantee dated 4th June 2004 issued by the Defendant No.5 being Exhibit "C" to the Plaint is null and void and/or that the same stands revoked;

(e) That this Hon'ble Court be pleased to issue an order and injunction restraining the Defendants from encashment and enforcement of the Bank

Guarantee dated 4th June 2004 bearing Ref.No.BBZ/L/G/3731/04, issued by the Defendant No.5, being Exhibit "C" hereto by way of permanent injunction thereon;

(f) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to issue an Order of attachment of the entire funds/properties of the Defendant No.3 being the Bank Guarantees more particularly set out in Exhibit "L" hereto;

(g) That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to order and direct that the sum of USD1500000/- lying in the account of the Plaintiff with the Defendant No.5 be released to the Plaintiff on such terms and conditions as this Hon'ble Court deems fit;

(h) That pending the hearing and final disposal of this Suit this Hon'ble Court be pleased to restrain the Defendants by an order and injunction of this Hon'ble Court from encashing and enforcing either wholly or in part, the Bank Guarantee dated 4th June 2004 bearing Ref.No.BBZ/L/G/3731/04 issued by the Defendant No.5 being Exhibit "C" hereto;

(i) That pending the hearing and final disposal of the Suit ad interim and interim reliefs be granted to the Plaintiff in terms of prayers (f),(g) and (h) hereinabove;

(j) That the Defendants be directed to pay to the Plaintiff the costs of this Suit;

(k) For such other and further reliefs as this Hon'ble Court may deem fit in the nature and circumstances of the case."

4. The plaintiff took out notice of motion praying therein for an order of attachment of the entire funds/properties of the defendant No.3 being the bank guarantees more particularly set out in

Exhibit "L" during the pendency of the suit and for restraining the defendants from encashing/enforcing either wholly or in part, the bank guarantee dated 4th June, 2004 issued by the defendant No.5 being Exhibit "C" to the plaint.

5. The learned counsel for the appellant contended before us as was contended before the learned motion Judge that the plaintiff was victim of fraud perpetrated by the first defendant as well as defendant No.3. It is the case of the plaintiff that the first defendant was procuring the business of data conversion from the third defendant which is a Singapore based company. The plaintiff was desirous of doing the same work and required assistance of the first defendant. and, therefore, the memorandum of understanding was executed between the first defendant and the plaintiff on 5th May, 2004. In furtherance to the memorandum of understanding between the plaintiff and the first defendant dated 5th May, 2004, further tri-partite agreement took place on 12th May, 2004 between the plaintiff, first defendant and the third defendant. As per this agreement, the data files converted from images by the plaintiff with their expertise would be forwarded to the third defendant on the terms and conditions recorded therein. The plaintiff’s case is that the bank guarantee dated 4th June, 2004 was furnished to fulfil the terms of

the contract dated 12th May, 2004 and as the fraud was perpetrated by the first defendant with the connivance of the defendant No.3, the encashment of the bank guarantee dated 4th June, 2004 must be restrained.

6. During the course of hearing, the learned senior counsel for the plaintiff handed in the Xerox copy of the final report dated 13.4.2005 to show that Ravindrakumar Navindchandra Doshi has been arraigned as the main accused and that Ashly Thomas, M/s.Wirana Pte.Ltd., Singapore (defendant No.3) have been cited as the wanted accused.

7. The learned senior counsel for the third defendant and the learned counsel for the fifth defendant supported the order dated 28th June, 2005 passed by the learned motion Judge.

8. Having reflected over the matter, we are of the considered view that the discretion exercised by the learned motion Judge in declining to grant the interim relief to the plaintiff during the pendency of the suit cannot be said to suffer from any legal infirmity warranting interference by us.

9. It does seem that the bank guarantee was given by the defendant No.5-Union Bank of India in favour of the defendant No.4-KBC Bank, Singapore in the

backdrop of the contract entered into between the plaintiff and the defendant No.3 for the purchase of digitized data. The terms of the bank guarantee, however, suggest the that defendant No.5 opened the irrecoverable advance payment guarantee for US Dollers 1,500,000.00 in favour of the defendant No.4 in consideration of the advance payment to the plaintiff by the defendant No.3 The bank guarantee opened by the defendant No.5 is irrevocable, unconditional and is given as primary obligor and not merely as surety. The relevant clauses of the bank guarantee are thus:

"1. AT THE REQUEST OF OUR CLIENT M/S.STP SOFTWARE INDIA PVT.LTD. INDIA WE HEREBY ESTABLISH OUR IRREVOCABLE ADVANCE PAYMENT GUARANTEE FOR USD 15,000,000.00 UNITED STATES DOLLARS ONE MILLION FIVE HUNDRED THOUSAND ONLY IN FAVOUR OF KBC BANK N.V., SINGAPORE IN CONSIDERATION OF AN ADVANCE PAYMENT TO M/S.STP SOFTWARE INDIA PVT.LTD. BY M/S.WIRANA PTE LTD.(.) WE UNION BANK OF INDIA, BHAT BAZAR BRANCH, MUMBAI INDIA HEREBY IRREVOCABLY AND UNCONDITIONALLY UNDERTAKE AS PRIMARY OBLIGOR AND NOT MERELY AS SURETY TO PAY YOU PAYMENTS NOT EXCEEDING A MAXIMUM AGGREGATE AMOUNT OF USD 1,500,000.00 (UNITED STATES DOLLARS ONE MILLION FIVE HUNDRED THOUSAND ONLY) TOGETHER WITH INTEREST THEREON CALCULATED ON THE AMOUNT OF THE ADVANCE PAYMENT AND ON THE BASIS OF 360 DAYS YEAR AT THE RATE OF 1 PERCENT PER ANNUM OVER REVELANT LIBOR FROM THE VALIDITY DATE UNTIL THE EXPIRY DATE(.)
(AS SUCH TERMS ARE DEFINED BELOW)

2. ANY DEMAND MADE BY YOU SHALL CONTAIN A STATEMENT THAT THE SUM OR SUMS DEMANDED ARE DUE TO YOU WITH STATEMENT SHALL BE DEEMED AS BETWEEN YOURSELVES AND US TO BE CONCLUSIVE EVIDENCE THAT SUCH SUM OR SUMS ARE DUE.

3. ALL PAYMENTS TOP BE MADE BY US HEREUNDER SHALL BE MADE FREE AND CLEAR OF ANY DEDUCTION OR WITHHOLDING OF ANY TAX WHATSOEVER UNLESS SUCH DEDUCTION OR WITHHOLDING IS REQUIRED BY LAW IN WHICH EVENT WE SHALL PAY TO YOU AN ADDITIONAL AMOUNT SO THAT THE NET AMOUNT RECEIVED BY YOU WILL EQUAL THE FULL AMOUNT YOU WOULD HAVE RECEIVED AND RENTED HAD NO DEDUCTION OF WITHHOLDING BEEN REQUIRED TO BE MADE.

4. THIS GUARANTEE SHALL BECOME VALID ONLY ON THE VALUE DATE 9TH THE VALIDITY DATE ON WHICH THE A/C OF UNION BANK OF INDIA, BHAT BAZAR BRANCH, MUMBAI A/C. NO.8033163429 WITH BANK OF NEW YORK WALL STREET, NY 10286 NY-10286 SWIFT UBININ88082 IS CREDITED FOR THE ADVANCE AMOUNT IN THE ACCOUNT OF M/S.STP SOFTWARE INDIA PVT.LTD. QUOTING REFERENCE NO.L/G3731/04.

5. THE AMOUNT OF THIS UNDERTAKING SHALL BE REDUCED BY THE NET VALUE OF EACH PAYMENT MADE BY QUOTING OUR REFERENCE NO.L/G3731/04. THE REDUCTION IN AMOUNT OF THIS UNDERTAKING WILL TAKE EFFECT IMMEDIATELY UPON TRANSMISSION BY YOU TO US OF YOUR AUTHENTICATED TELEX OR SWIFT ADVISE CONFIRMING THE VALUE DATE AND THE AMOUNT OF FUNDS RECEIVED BY YOU IN REDUCTION QUOTING REFERENCE NO.BBZ/LZ 3731/04.

6. THIS GUARANTEE EXPIRED AT OUR COUNTERE AT THE CLOSE OF BUSINESS ON (360TH DAY) 29.05.2005 (THE EXPIRY DATE) AND YOUR DEMAND FOR PAYMENT HEREUNDER MUST BE MADE TO US BY AUTHENTICATED SWIFT NO. UBININBBABZ AND MUST BE RECEIVED BY US NOT LATER THAN THE CLOSE OF BUSINESS BY THE EXPIRY DATE I.E.29.05.2005.

7. NOTWITHSTANDING ANYTHING CONTAINED HEREIN, OUR LIABILITY UNDER THIS GUARANTEE SHALL BE LIMITED TO A SUM OF USD 1,50,000,00 (UNITED STATES DOLLARS ONE MILLION FIVE HUNDRED THOUSAND ONLY) PLUS INTEREST THEREON AND IN THE EVENT THAT WE HAVE NOT RECEIVED YOUR DEMAND AS OUTLINED ABOVE ON OR BEFORE THE CLOSE OF BUSINESS ON THE EXPIRY DATE I.E.29.05.2005. THIS GUARANTEE SHALL EXPIRE AND BE OF NO EFFECT AND ANY DEMANDS RECEIVED THEREAFTER SHALL BE CONSIDERED NULL AND VOID (.) PAYMENTS

BY US IN EVENT OF CLAIM BY YOU WILL ONLY BE MADE ON THE EXPIRY DATE OF THIS GUARANTEE.

8. TO THE EXTENT THAT WE PAY IN ANY JURISDICTION, CLAIM FOR OUR ASSETS IMMUNITY (WHETHER OR NOT CLAIMED), WE HEREBY IRREVOCABLY WAIVE SUCH IMMUNITY TO THE FULL EXTENT PERMITTED BY THE LAWS OF SUCH JURISDICTION.

9. WE FURTHER UNDERTAKE THAT THIS GUARANTEE AND OUR LIABILITY HEREUNDER SHALL NOT BE VARIED, ALTERED OR REDUCED WITHOUT YOU PRIOR WRITTEN AGREEMENT."

10. It is not in dispute that the defendant No.3 did remit in the account of the plaintiff with the defendant No.5 an amount of US Dollars 1,500,000.00. The said amount was received on 14th June, 2004. The nature of the bank guarantee that has been given by the defendant No.5 clearly bears out that the bank's obligations thereunder are distinct and independent and the said bank guarantee is not concerned with the underlying transaction that is the contract entered into between the plaintiff and the defendant No.3 for the purchase of digitised data.

11. The legal position has been highlighted by the Supreme Court from time to time concerning the bank guarantees. In the case of United Commercial Bank v. Bank of India and others, AIR 1991 SC 1426, the Supreme Court held that the bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and

seller. Duties of a bank under a letter of credit are created by the document itself. In the inter-bank guarantees the courts usually refrain from granting injunction to restrain the performance of the contractual obligations and if such temporary injunctions were to be granted in a transaction between a banker and a banker, the whole banking system in the country would fail.

12. In the case of Hindustan Steel Works Construction Ltd. v. Tarapore and Co. and another, AIR 1996 SC 2268 upon which reliance is placed by the learned counsel for the appellant, the Supreme Court observed that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. It was further held by the Supreme Court that the fraud cannot be said to be the only exception. In case where the party approaching the court is able to establish that in view of special equities in his favour if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere. The fraud which is recognised as an exception, is the fraud by one of the parties to the underlying contract and which has the effect

of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. If that be so, the courts can restrain a person making such a fraudulent demand from enforcing a bank guarantee.

13. Having considered the entire facts and circumstances of the case, we agree with the view of the learned motion Judge that prima facie case of fraud or irretrievable injustice has not been made out by the plaintiff. There are no special equities in favour of the plaintiff that justify the grant of temporary injunction. We have already noticed above that in so far as the defendant No.3 is concerned, the payment in the sum of US Dollars 1,500,00.00 has been remitted in the account of the plaintiff with the defendant No.5. The bank guarantee was issued by the defendant No.5 in favour of the defendant No.4 for a period of 360 days for the value of US Dollars 1,5000,000.00 in consideration of advance payment that would be received by the plaintiff from the defendant No.3 and that advance payment was in fact, remitted by the defendant No.3 in the account of the plaintiff and was received. If there was any fraud perpetrated by the first defendant upon the

plaintiff, prima facie the defendant No.3 cannot be blamed for that. There is no specific allegation of fraud pleaded against the defendant No.3 in the plaint. Moreover, what is the claim of the plaintiff in the suit. The claim is for unliquidated damages to the extent of Rs.2,11.02,832/- for the losses occurred to them by some misrepresentation allegedly made by the first defendant through Ravindra Kumar Doshi. If the plaintiff is able to prove its case in the trial and a decree is passed in its favour, it can always be executed against the defendant No.4 which is a bank. The criminal case lodged before the Economic Offences Wing against Ravindra Kumar Doshi and the final report under section 173 Cr.P.C. dated 11.7.2005 wherein Ashly Thomas and the defendant No.3 are cited as wanted accused, in our considered view, do not justify the restraint order against defendant No.5 from encashing the bank guarantee which is absolute, irrevocable and independent of the contract alleged to have taken place between the plaintiff, the first defendant and the defendant No.3. Pertinently, the averments in the plaint and the available material do not prima facie make out a case of fraud as canvassed by the learned senior counsel.

14. We find ourselves in agreement with the view of the learned motion Judge that no case for grant

of temporary injunction is made out in restraining the bank guarantee dated 4th June, 2004.

15. Before we close, we may indicate that there is communication dated 11th May, 2004 by the Inspector of Police, EOW, Unit-III, C.B., C.I.D., Mumbai to the Manager of the defendant No.5-Bank on record informing that the bank guarantee dated 4th June, 2004 stands freezed under section 102 of Cr.P.C. pending further order from the court. We clarify that the order of the learned motion Judge and our order shall not have any effect on the communication dated 11th May, 2005 sent by the Inspector of Police, EOW, Unit-III, C.B., C.I.D., Mumbai to the defendant No.5-Bank. It is for the concerned party to take up the matter with the concerned authority/forum for defreezing the said bank guarantee.

16. We find no justifiable reason to entertain the appeal. The appeal is dismissed in limine.

17. The learned senior counsel for the appellant orally prayed for stay of our order. The oral prayer is rejected.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)